

ADMINISTRATIVE APPEAL DECISION
FILE NO. NWK-2008-00026 (Currie)
KANSAS CITY DISTRICT (NWK)
SECTION 404 AUTHORITY
September 26, 2008

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

Appellant: Michael Currie (Anna L. Currie Rev Trust c/o Curries, Inc)

Receipt of Request For Appeal (RFA): April 30, 2008 (Encl 1)

Site Visit Date: June 5, 2008

Summary of Appeal Decision: The Appellant is challenging what he believes is the assertion by Kansas City District (NWK) that the U.S. Army Corps of Engineers has jurisdiction over a segment of unnamed tributary and an aquatic feature that has been identified as an artificial wetland (shallow pond) on his property. In particular he asserts that the segment of unnamed tributary in question is not hydrologically connected to any stream, has a discontinuous bed and bank, and does not significantly effect the nearest navigable stream. He also asserts that the artificial wetland is isolated from other waters of the United States. I find that the Administrative Record is unclear as to what feature(s) on the appellants property are being considered jurisdictional. I also find that current administrative record is not sufficient to support a finding of jurisdiction beyond a length of unnamed tributary approximately 500 feet in length. NWK's approved JD is being remanded.

Background Information:

The administrative record (AR), provided by NWK is attached as Enclosure 2. A Memorandum for Record dated 25 April 2008 (Subject: NWK-2007-000026, Summary/Rebuttal for Administrative Appeal of Jurisdictional Determination (JD) by Michael R. Currie, Anna L. Currie Rev Trust was attached to the AR (Pages 1-2).

The appellant requested an appeal of an Approved Jurisdiction Determination (JD) involving agricultural property in Gypsum, Saline County, Kansas. The JD indicates the water in question is an unnamed tributary to Gypsum Creek (hereafter referred to as the unnamed tributary). The appellant is proposing to convert the property containing the waterway in question to agricultural use.

History:

September 4, 2008--A jurisdictional determination was initially requested by the Natural Resources Conservation Service in conjunction with their whole tract wetland delineation of property owned by Anna L. Currie Rev Trust.

January 23, 2008--The District completed an approved jurisdictional determination from the office. This information was provided to NRCS in a standardized joint NRCS/Corps form on that same date. This standardized form states that "This is an Approved Jurisdictional Determination, which may be subject to appeal through the U.S. Army Corps of Engineers Administrative Appeal Process for the Regulatory Program. If the landowner wishes, they may contact this Corps Office to request an appeals form and information regarding the appeals process." It is not known exactly when the NRCS provided Mr. Currie with a copy of this form.

Early March 2008--The appellant contacted the District to request a copy of the Approved JD, appeals form and information regarding the appeals process.

March 6, 2008--The JD and appeals information was provided to Mr. Currie

March 31, 2008 -- Request for Appeal (RFA) received by NWD (forwarded from NWK)

28 April 2008 - NWK provided AR to the appellant and the NWD Appeals Review Officer (RO).

5 June 2008 – RO conducts site visit with Luke Cory of NWK's Kanopolis Field Office and the appellant, Michael Currie. Mr. Currie conducted a general tour of the site via all terrain vehicle. There were discussions between Luke Cory and Mr. Currie regarding what Mr. Currie's plans were, as well as possible issues and potential resolutions that may arise during the permit evaluation process, should the final outcome of jurisdiction be that authorization be required. The RO viewed the site from an overall landscape perspective and did not make detailed, site specific observations. The RO did observe a point, near the extreme east portion of the property, where there was a distinct beginning of a confined channel (upslope of that point it appeared that runoff of precipitation would have been via unconfined overland flow). At that point, the very shallow channel contained vegetation believed to be hydrophytic, as well as surface water. The source of that surface water, beginning at that point, appeared to have been groundwater water and/or throughflow, not surface runoff. Elsewhere on the site, the RO did not observe a point(s) where the channel was not evident. The RO did not closely observe the relationship (channel connection or lack thereof) between a pond on the site and the relatively clearly defined channel.

Enclosure 3a. is an aerial photo, from the AR, that shows the location of the property in relation to the nearest TNW. The unnamed tributary is a headwater stream that arises either on or a short distance above the subject property and flows approximately 1.6 miles to Gypsum Creek and then approximately 13.8 miles to the Smoky Hill River (TNW).

Enclosures 3b. and 3c. are portions of topo maps that show the blue-line relationship between the unnamed tributary and Gypsum Creek.

Enclosure 4. is the *Preliminary Certified Wetland Determination Map* (NRCS map). This map was produced by the Natural Resources Conservation Service (NRCS) and shows the locations of aquatic features on the subject property. The NRCS map will be discussed in the Appeal Evaluation below.

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER (DE):

Reason 1 (as quoted verbatim from the appellant's RFA): I challenge the Other Waters of the U.S. determination on the following grounds.

- A. The area determined to be "Other Waters" is not hydrologically connected either above or below the property to any stream.
- B. The area determined to be "Other Waters" has discontinuous bed and bank.
- C. The area Determined to be "Other Waters" would not significantly effect the nearest navigable stream because of its isolation, area drained, and distance (approximately 10-15 miles).

FINDING: This reason for appeal has merit for the reasons contained in the Discussion section below.

ACTION: The JD is remanded to the District for reevaluation, reconsideration, and additional documentation.

DISCUSSION:

The two documents contained in AR that are critical to the jurisdiction determination are the Approved JD Form (JD Form; AR 9-16) and the information submitted to the District by the Natural Resources Conservation Service (NRCS), including the document titled "*Preliminary Certified Wetland Determination Map*" (NRCS Map, AR 20-38).

For purposes of discussion, based on the NRCS Map, the aquatic features present on the site can be divided into the following:

Site 1. This is the area denoted as Artificial Wetland (AW). NRCS describes this area as "This old silted in pond has a max water depth of about 12 inches. It meets all three wetland parameters (87COE)."

Site 2. This is a collection of areas that appear as discontinuous linear features on the NRCS Map. This is the upstream portion of the unnamed tributary in question. The following distinction was made between features described as Site 2:

-Site2-wp17 (purple reach) -- NRCS reports, "This reach of channel remnant is about 3 feet wide and about 1-3 ft deep. It shows on the USGS tope as unnamed tributary to Gypsum Creek. This reach is relatively undisturbed, it has a defined bed/bank, and intermittent ohwñ, is mostly unvegetated. Drainage area is about 325-350 acres in this reach. Note: some of the channel remnants above and below this site meet wetland criteria. However, they are not connected by well defined bed/bank zones. My assumption here would be that the flow line zones in between these wetland and potential OW areas have silted in from erosion from adjacent cropland to the east and north."

-Site2 (all other)— NRCS reports, "these sites are channel remnants. Most are really just shallow depressional areas at this point. However they all meet wetland criteria (87COE)."

Site 3. A length of channel that NRCS reports, "has a defined bed and bank and is completed (*sic*) vegetated with hydrophytes. It continues down the road ditch and goes through a road culvert, and proceeds southwest through sections 3 and 10 to confluence with Gypsum Creek." This is the most downstream portion of the unnamed tributary in question.

Site 5. Two areas the described by NRCS as "shallow flood plain depressions and (*sic*) meet all 3 wetland parameters (87COE)"

The JD Form indicates that this was an office determination; hence it is not based on a site visit by Corps personnel. The JD Form indicates that waters of the U.S. are present on the site as "Non-RPW's that flow directly or indirectly into TNW's" and estimates its size as 2500 linear feet (Section II.1) and identifies the route from the unnamed tributary to the nearest TNW (Sec III.B.1(ii)). The District noted on the JD Form, "According to the application submitted by NRCS, the tributary is not connected by a well defined bed/bank zones due to possible erosion (*sic*) from adjacent croplands." There is no further reference, discussion, nor analysis regarding continuity of the channel nor flow within the JD Form. There is neither reference to, nor analysis of potential jurisdiction over isolated, abutting, nor adjacent wetlands or waters.

The District submitted a Memo for Record the dated 25 April 2008, Subject: NWK-2008-00026, *Summary/Rebuttal for Administrative Appeal of Jurisdictional Determination (JD) by Michael R. Currie, Anna L. Currie Rev Trust* along with the AR. That memo contains information and analysis that is not otherwise present in the AR. That information and analysis could be critical in determining jurisdiction, but did not exist at the time the Approved JD was completed and must be considered new information, rather than clarification. That information can not be considered in this appeal decision.

The AR clearly supports a finding of CWA jurisdiction over the feature denoted as "Site 3" on the Map. There is sufficient information to support a conclusion this feature is a non-RPW that flows directly or indirectly into a TNW. Based on the NRCS map and scale, the estimated length of this channel is approximately 500-700 linear feet.

The AR is unclear whether the assertion of jurisdiction on this property is limited to "Site 3", or if the jurisdiction determination also included areas NRCS noted as Sites 1 (artificial wetland-pond), Site 2 (numerous "remnant channels") and/or site 5 ("flood plain depressions"). It is also not clear from the record if, in fact, the District concurs these are distinct features or finds that they are connected and/or have a significant nexus.

This reason for appeal has merit. The District must clearly distinguish which aquatic feature(s) or "sites" are subject to CWA jurisdiction.

Reason 2 (as quoted verbatim from the appellant's RFA): I also challenge the Artificial Wetland determination on the basis that the area determined to be an Artificial Wetland is isolated from any Other Waters of the U.S. because of the discontinuous bed and bank.

Note: This challenge is directed at what is denoted as Site 1. on the NRCS Map.

FINDING: This reason for appeal has merit for the reasons contained in the Discussion section below.

ACTION: The JD is remanded to the District for reevaluation, reconsideration, and additional documentation.

DISCUSSION: As detailed in the Discussion section under reason for appeal #1, the AR is unclear whether the assertion of jurisdiction on this property is limited to "Site 3", or if the jurisdiction determination also includes the areas NRCS denoted as Site 1 (Artificial Wetland) and other "sites" or features shown on the NRCS Map.

This reason for appeal has merit. The district must specifically address CWA authority over the area noted as "Site 1" on the NRCS Map in accordance with the JD Form Instructional Guidebook.

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

33 C.F.R. 331.3(a) (2) sets the authority of the Division Engineer to hear the appeal of this JD. However, the Division Engineer does not have authority under the appeal process to make a final decision regarding JDs, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his

RO conducts an independent review of the administrative record to address the reasons for appeal cited by the Appellant. The administrative record is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. Section 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the administrative record. Such interpretation, clarification, or explanation does not become part of the District's administrative record, because the District Engineer did not consider it in making the decision on the JD. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. NWK provided a copy of the administrative record to the RO and the Appellant. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was 6 March 2008.
2. A site visit was held on June 5, 2008. The site visit was primarily to clarify the general, overall site conditions and relationships. A specific report was not produced, but general references to what was observed are contained in this record. This is deemed clarifying information.
3. The District provided a Memo for Record dated April 25, 2008, along with the Administrative Record. This information/analysis was not contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. This information can not be considered in this Appeal Decision. The District can incorporate this information in its reconsideration of jurisdiction on this property.

OVERALL CONCLUSION: After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and the information obtained during the appeal site visit, I find that both reasons for appeal set forth by the Appellant have merit. I am remanding the Appellant's jurisdictional determination to the Kansas City District for reevaluation, reconsideration, and additional documentation to assure that the administrative record provides a reasonable basis for asserting jurisdiction. The final Corps jurisdiction decision will be the Kansas City District Engineer's decision made pursuant to my remand.

FOR THE COMMANDER:



PAUL R. WEMHOENER
Chief, Program Support Division